89-1922

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAMILA WILLIAMS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS A. HOWARD (P15176)
Attorney for Petitioner
20830 Rutland
Southfield, Michigan 48075
(313) 552-8900

DONALD HOWARD STOLBERG
(P40698)
32330 West Twelve Mile Road
Farmington Hills, Michigan
48018

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

QUESTIONS PRESENTED

A.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED WHEN IT DECIDED THAT PETITIONER HEREIN HAD NOT DEMONSTRATED AN ACTUAL CONFLICT OF INTEREST.

B.

WHETHER REVERSAL OR REMAND IS AUTOMATIC WHEN THE TRIAL COURT FAILS TO CONDUCT ANY Fed. R. Crim. P. 44(c) HEARING ALTHOUGH IT KNOWS OR REASONABLY SHOULD KNOW OF THE SERIOUS POTENTIAL FOR CONFLICT ON THE FACE OF THE INDICTMENT AND THE EVIDENCE ADDUCED AT TRIAL; EVEN THOUGH TRIAL COUNSEL MAKE NO OBJECTION BELOW.

LIST OF ALL PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OCELIA PERKINS;
DONALD J. MCQUEEN;
JOYCE SCOTT;
PAMILA H. WILLIAMS;
ANDERS MIGDALECK; and
STELLA WARE,
Defendants-Appellants.

Nos. 88-1953; 1954; 1955; 1956; 88-2031; 88-2110

TABLE OF CONTENTS

TABLE OF CONTENTS — (Continued)

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PAMILA H. WILLIAMS, by and through her attorney, THOMAS A. HOWARD, petition herein for a Writ of Certiorari to review the decision rendered in the United States Court of Appeals for the Sixth Circuit affirming Petitioner herein's judgment of conviction in the United States District Court for the Eastern District of Michigan, Southern Division, on one count of Mail Fraud, in violation of 18 U.S.C. §1341; and two counts of Interstate Transportation of Securities Taken by Fraud, in violation of 18 U.S.C. §2314.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed March 7, 1990, affirming the District Court's conviction is reprinted in full as Appendix B. The opinion of the Sixth Circuit has not been recommended for full text publication.

JURISDICTION

The Opinion and Decision appealed from was filed and entered March 7, 1990, by the United States Court of Appeals for the Sixth Circuit. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND COURT RULE

The Constitutional provision herein involved is the Sixth Amendment to the United States Constitution which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Statutory provisions herein involved are 18 U.S.C. §1341 and 18 U.S.C. §2314, respectively.

18 U.S.C. §1341 states:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both. (As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, §961(i), 103 Stat. 500.)

Section 18 U.S.C. §2314 states:

Transportation of stolen good, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making forging, altering, or counterfeiting any security or tax stamps, or any part thereof —

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This

section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by laws or usage of such country to circulate as money.

(As amended Nov. 18, 1988, Pub.L. 100-690, Title VII, §§ 7057, 7080, 102 Stat. 4402, 4406).

The Federal Rule of Criminal Procedure herein involved is Fed. R. Crim. P. 44, and which states:

Right to and Assignment of Counsel

(a) *Right to Assigned Counsel.* Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

(b) *Assignment Procedure.* The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto. As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972.

(c) *Joint Representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel. (As amended Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987.)

STATEMENT OF THE CASE

The Petitioner, Pamila Hatter Williams (hereinafter referred to as "Petitioner"), was charged on January 6, 1988, in a twenty-three (23) count indictment naming nine (9) other individuals, in the United States District Court for the Eastern District of Michigan, Southern Division. Petitioner was charged in Counts X through XII inclusive, with one (1) count of Mail Fraud in violation of 18 U.S.C. §1341, and two (2) counts of Interstate Transportation of Securities Taken by Fraud, in violation of 18 U.S.C. §2314, respectively. The indictment alleged eight (8) schemes to defraud insurance companies based upon the alleged false and fraudulent filing of claims for the purpose of obtaining insurance proceeds in connection with alleged arson fires at residential dwellings in the Detroit area.

Petitioner was charged as stated above along with her cousin, co-defendant, Michael White, Anita Vienueva Sackett, originally charged as a defendant but who later testified as a government witness pursuant to a grant of full transactional immunity in connection with her duties as the public adjuster; and Anders Migdaleck, the fire repair contractor; in connection with an alleged arson fire which occurred at certain rental property owned by Petitioner located at 18335 Faust in the City of Detroit.

Petitioner and her cousin, co-defendant Michael White, were jointly represented at trial by Mr. Seymour Floyd. In addition to being charged in Counts X through XII of the Indictment, co-defendant White was further charged along with Anders Migdaleck and Anita Vienueva Sackett, in Counts V through IX with Mail Fraud, in violation of 18 U.S.C. §1341; in connection with an alleged arson fire at co-defendant White's residence located at 14922 Ferguson in the city of Detroit. Co-defendant White was also charged along with the defendant Anders Migdaleck and Anita Vienueva Sackett in Count XXIII with Mail Fraud, in violation of 18 U.S.C. §1341; in connection with an alleged arson fire at the residence of Mr. Willie Dash located at 13908 Thompson in the city of Detroit.

On July 15, 1988, following a lengthy jury trial before the Honorable Horace W. Gilmore, petitioner herein was found guilty of one (1) count of Mail Fraud and two (2) counts of Interstate Transportation of Securities Taken by Fraud as charged in the Indictment. Co-defendant White was also found guilty on all counts, as charged in the Indictment.

On September 23, 1988, Petitioner herein was sentenced by Judge Gilmore on Count X to three (3) years incarceration, and a fine of Five Thousand ($5,000.00) Dollars. On Count XI Petitioner was sentenced to three (3) years incarceration to run concurrently with the sentence imposed in Count X. On Count XII Petitioner received the imposition of a suspended sentence to run consecutively to the sentence imposed in Count X. Further, Petitioner received a five (5) year probationary period to begin after having served the time imposed in Count X; and finally, Petitioner herein was ordered to make full restitution in the amount of Thirty One Thousand Nine Hundred Thirty-Eight ($31,938.00) Dollars in monthly installments of Five Hundred Thirty-Two and 30/100 ($532.30) Dollars. (Appendix B.)

Co-defendant White on the other hand, was sentenced as follows: Count V: five years imprisonment; Count VI: five years imprisonment, to run consecutively to Count V for a total of ten (10) years imprisonment. On Counts VII through X and on Count XXIII, co-defendant White was sentenced to five (5) years imprisonment, to run concurrently with the sentence imposed in Counts V and VI. Regarding Counts XI and XII, co-defendant White received a suspended sentence and was placed on probation for five (5) years to be served consecutively with the sentence imposed in Counts V and VI. Co-defendant White was further ordered to make full restitution in the amount of Twenty Seven Thousand Five Hundred and Sixty Dollars and eighteen cents ($27,560.18) within the first fifty-eight (58) months of probation at a monthly rate of Four Hundred Ninety-Two Dollars and forty-two cents ($492.42). (Appendix C.)

The government presented three (3) witnesses whose testimony related to Petitioner herein and co-defendant White, all of

whom had testified pursuant to a grant of immunity. Albert Meredith, Sr., Willie Weems, and Anita Vienueva Sackett.

The government first presented Albert Meredith, Sr. Mr. Meredith testified at trial that he had been in the fire repair business as a salesman for twenty (20) years. Mr. Meredith, Sr., testified on direct examination that he worked as a salesman for Town and County Builders, and its owner, defendant Mr. Anders Migdaleck. Mr. Meredith also testified generally as it relates to co-defendant White's involvement in the scheme to defraud that he had worked for Town and Country Builders between the years of 1982 through 1984. Further, Mr. Meredith, Sr., testified that co-defendant White had received monies paid by Town and Country Builders as a result of arson fires and that, as time went by, co-defendant White became more deeply involved in the arson for profit scheme. Finally, Mr. Meredith, Sr. testified that co-defendant White eventually became Mr. Willie Weems' driver on a number of occasions as it relates to providing transportation for Mr. Weems (a government witness) to and from the actual situs of arson fires when Mr. Weems went to various locales for the purpose of setting homes afire.

More specifically as it relates to the petitioner herein, Mr. Meredith testified that in connection with the arson fire which took place at 18335 Faust, the rental property owned by petitioner, that co-defendant White and Petitioner went together to meet Mr. Meredith, Sr. at his friend's house and while there discussed a possible arson fire at her property. Meredith, Sr., testified that co-defendant White did most of the talking and that co-defendant White hoped that Meredith, Sr., would persuade Petitioner to have an arson fire at her property. Further, Meredith, Sr., testified that when he found out Petitioner herein was a Detroit Police Officer, he lost interest in the proposition altogether. Most importantly of all as it relates to this particular discussion, Meredith, Sr., testified that Petitioner herein expressed that she did not want any part in any proposed arson for profit scheme to defraud.

After the fire had occurred at the Faust Street property, Meredith, Sr., testified that he, Petitioner, co-defendant White, and defendant Anders Migdaleck met at the offices of Town and Country Builders at which time Petitioner signed a contract for repairs. Meredith, Sr., also testified that co-defendant White received a "commission fee" as a result of the fire. Finally, Mr. Meredith, Sr., testified that subsequently Petitioner herein cancelled her contact with Town and Country Builders by telegram. Significantly, on cross-examination of Meredith, Sr., by Mr. Seymour Floyd, defense trial attorney for Petitioner herein and co-defendant White, Meredith, Sr., was not asked a single question regarding the above circumstances surrounding the arson fire on Faust Street nor did he ask even one question regarding co-defendant White's high degree of criminal involvement with the building contractor, Town and Country Builders.

The government then presented as its witness Mr. Willie Weems a convicted arsonist, who testified pursuant to a grant of transactional immunity. Mr. Weems testified that he had known co-defendant White since 1978, and admitted committing the arson at Petitioner's property and at co-defendant White's residence on Ferguson Street, among others. Mr. Weems testified that three (3) or four (4) days before he set fire to Petitioner's property on Faust Street he received a telephone call from co-defendant White who excitedly informed him that he had a "party" (a pre-arranged code word for arson), but Mr. Weems thought it would be best to meet face to face instead of discussing it over the telephone. Further, Mr. Weems testified that he had spoken to a female that he believed was your Petitioner herein on the telephone and discussed with her receiving her policy of insurance but admitted that he had never met face to face with the Petitioner and that co-defendant White agreed to act as a go between Petitioner and Mr. Weems. According to Mr. Weems, co-defendant White presented Petitioner's policy of insurance for his inspection as to coverage and that co-defendant White informed Weems that Petitioner agreed to pay Five Hundred ($500.00) Dollars to Mr. Weems in order to assure Mr. Weems that Petitioner was definite about her desire to burn the Faust

Street property. Weems further testified that within the twenty-four (24) hours before the day of the fire on Faust he and co-defendant White drove to an unknown address on Faust, presumably the residence of Petitioner, where co-defendant White exited the vehicle above and returned to the car with approximately Two Hundred Seventy Five ($275.00) Dollars.

According to Mr. Weems, on the night of the Faust Street fire, co-defendant White drove Mr. Weems to a store where Mr. Weems purchased lacquer thinner as an accelerant for the arson. Co-defendant White parked a couple of blocks away from the Faust Street location where co-defendant White gave Mr. Weems a set of keys to the Faust Street property at which time Mr. Weems walked to and entered the location, started a fire, and exited the location and was subsequently driven from the scene by co-defendant White who drove to Mr. Weems' residence where co-defendant White contacted Mr. Meredith, Sr. Mr. Weems further testified that he was paid by co-defendant White with monies received as a "commission" from defendant Migdaleck. Finally, Mr. Weems testified that Petitioner had cancelled the repair contract with Town and Country Builders and that he was required to repay Town and Country and expected to be reimbursed by co-defendant White for his efforts but that co-defendant White never did repay him.

Petitioner testified in her own behalf and denied any knowledge and/or involvement in any way with the charged offenses. Co-defendant White chose not to testify in his own behalf. At no time through the course of this lengthy trial was Petitioner inquired of and advised by the trial judge pursuant to Fed. R. Crim. P. 44(c). At no time during the course of Mr. Floyd's joint representation of Petitioner and co-defendant White did Mr. Floyd advise or in any way discuss with Petitioner the risks inherent for conflict of interest in this case. (Appendix D.) Mr. Floyd was retained for Petitioner and paid for by co-defendant White's sister, Ms. Gloria White. At the time Ms. White retained Mr. Floyd for Petitioner, Mr. Floyd was simultaneously representing Ms. White in an unrelated civil matter. At no time did Mr.

Floyd convey to Petitioner the possibility of exploring a possible plea agreement in her behalf or the possibility that she might testify against co-defendant White pursuant to a grant of immunity. (Appendix D.)

REASONS FOR GRANTING THE PETITION

ARGUMENT A.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED WHEN IT DECIDED THAT PETITIONER HEREIN HAD NOT DEMONSTRATED AN ACTUAL CONFLICT OF INTEREST.

For the reasons set forth below, the Petitioner herein had demonstrated on appeal that her trial attorney had labored under an actual conflict of interest at trial. The Court of Appeals erred regarding questions of law and questions of fact. Therefore, Petitioner's conviction should have been reversed for the reason that the Petitioner herein had never waived her right to the effective assistance of counsel and had demonstrated that her interests were inherently in conflict with that of her co-defendant White based on the record made at trial in the District Court.

An actual conflict of interest has been defined in applicable case law to encompass two basic elements. First, the Defendant must show that a viable alternative defense strategy might have been employed at trial. The defendant is not required to prove that the alternative strategy would have been successful, but only that the alternative strategy had sufficient merit to be pursued. Secondly, the defendant must show that the viable alternative strategy which might have been pursued was innately in conflict with the defense attorney's duty of loyalty to the other co-defendant. *Brien* v. *United States*, 695 F.2d 10, 15 (1st Cir. 1982), citing *Foxworth* v. *Wainwright*, 516 F.2d 1072, 1079 (5th Cir. 1975); *United States* v. *Martorano*, 620 F.2d 912, 917 (1st Cir.) *en banc, cert. den.*, 449 U.S. 952 (1980).

The facts of this case made on the record at trial in the District Court obviate that the alternative defense strategy that

should have been pursued at trial in this case on behalf of Petitioner is the shifting of the blame defense onto co-defendant White. However, trial counsel could not have pursued this strategy on behalf of Petitioner without compromising the duty of loyalty he owed to protect the interests of his other client co-defendant White. The facts of this case easily demonstrate the viability of this strategy. Moreover, the shifting blame strategy may well have been the only plausible defense strategy on behalf of the Petitioner.

Petitioner herein asserts several errors of fact and law which the appellate court committed in its decision. First, as it relates to errors of fact the 6th Circuit erred when it found that Petitioner had the arsonist, Willie Weems, review her policy of insurance to make sure the property was adequately insured when in fact the record made at trial discloses that Weems testified that co-defendant White supposedly presented Petitioner's insurance policy for Weems to review. (Appendix A, p. 15.) Secondly, the Sixth Circuit decision states that Weems testified that Petitioner agreed to the fire and paid Weems a deposit to insure that Petitioner was definite about her intentions for the fire. (Appendix A, p. 15) This is incorrect based on the record at trial where Weems testified that co-defendant White allegedly acted as a go-between Petitioner and Weems and that Weems had never spoken face to face with Petitioner about agreeing to burn the Faust Street property; and furthermore, it was co-defendant White who delivered assurance money to Weems allegedly on behalf of Petitioner. These errors are significant because they make stronger the argument that the shifting blame defense was a viable and plausible alternative defense strategy.

Finally, the Sixth Circuit makes no mention of the fact that Petitioner cancelled the contract with the repair contractor, Town and Country Builders, within the three days allowable by law. This is a very significant fact based on the testimony of Meredith, Sr., who testified that when he met with Petitioner she did not want to take part in any arson for profit scheme. This is another

significant fact which indicates that, at worst, Petitioner was an unwilling participant in the scheme to defraud.

The Sixth Circuit relies heavily on the case of *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), wherein this Court held that in order to establish a denial of the right to effective assistance of counsel the defendant who raises no objection below must demonstrate that an actual conflict of interest adversely affected the adequacy of her representation. *Id.* at 348. However, the Sixth Circuit also failed to recognize that in *Cuyler, supra,* the Court did not find any duty for the State trial court to advise and inquire because the trial court did not and could not reasonably be expected to know of the potential for conflict. Further, the Sixth Circuit decision in this case makes no mention of the fact that a defendant who demonstrated an actual conflict need not show prejudice. *Id.* at 349, 350; and citing *Holloway* v. *Arkansas*, 435 U.S. 473, 487-491 (1978).

The Sixth Circuit decision in this case would seem to require that Petitioner herein show that she was somehow prejudiced by the joint representation. The decision below conceded that the evidence of co-defendant White's participation in the overall scheme and his involvement in the arson of Petitioner's property was stronger than the evidence against Petitioner but the decision goes on to state that this fact "does not diminish the force of the evidence that Williams was identified as a participant in the scheme to set the home she owned on fire." (Appendix A, p. 15.) This finding without regard to its accuracy, would seem to require a showing of prejudicial impact by Petitioner in contravention of this Court's previous rulings.

In the case of *United States* v. *Cirrincione*, 780 F.2d 620 (7th Cir. 1985), the court recognized that arson cases are classical examples for conflict of interest where the defense strategy of shifting the blame is most often employed. However, in *Cirrincione, supra*, at 630, since defendant waived his right to conflict-free counsel on the record, he was required to demonstrate that he was prejudiced by an actual conflict of interest at trial which he was unable to do in light of a proper waiver.

In the case of *United States* v. *Romero*, 780 F.2d 981 (11th Cir. 1986), the court reversed the conviction of defendant Steinwachs' on similar facts to the case at bar. Steinwachs was a low level employee jointly represented at trial by an attorney who also represented high level employees of a company which was engaged in the illegal narcotics trade. Although the trial court did conduct a 44(c) inquiry, albeit defective, the 11th Circuit reversed Steinwachs' conviction based on an actual conflict of interest based on the relative participation of Steinwachs' and his jointly represented co-defendants. In this case, the 11th Circuit did not require a showing of prejudicial impact but only that the shifting blame defense was "feasible". *Id.* at 986.

In short, the trial court had a duty to inquire of Petitioner based on Fed. R. Crim. P. 44(c), and the evidence adduced at trial because it knew or reasonably should have known of the possibility for conflict. The trial court did not conduct a 44(c) hearing nor did Petitioner herein at any time waive her right to conflict free counsel. Moreover, for the reasons set forth above, Petitioner herein did demonstrate on appeal an actual conflict of interest in light of the record made at her trial and in light of the errors of fact and law committed by the Sixth Circuit. Therefore, Petitioner herein has been denied the effective assistance of counsel.

ARGUMENT II

REVERSAL OR REMAND IS AUTOMATIC WHEN THE TRIAL COURT FAILS TO CONDUCT ANY Fed. R. Crim. P. 44(c) HEARING ALTHOUGH IT KNOWS OR REASONABLY SHOULD KNOW OF THE SERIOUS POTENTIAL FOR CONFLICT ON THE FACE OF THE INDICTMENT AND THE EVIDENCE ADDUCED AT TRIAL; EVEN THOUGH TRIAL COUNSEL MAKE NO OBJECTION BELOW.

The Sixth Circuit decision relies heavily on the case of *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980), wherein the Court

has held that "a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." This case however is inapplicable to the case at bar for the following reasons.

First, *Cuyler, supra*, involved a state case where no comparable state statute imposed a duty on the trial court to inquire and advise each co-defendant jointly represented of the risks inherent for conflict of interest. Secondly, this case was decided before Fed. R. Crim. P. 44(c) was effective, which imposed on the Federal Courts such a duty to inquire and advise. However, *Cuyler, supra*, does stand for the proposition that if the trial court knows or reasonably should know of a particular conflict then the trial court is compelled to conduct an inquiry on the record of the potential for conflict. In that case the Court decided that the trial court did not have such a duty because of the provision for separate trials of the co-defendants and for the reason that the defenses of each co-defendant were not mutually exclusive.

It cannot reasonably be argued that the trial court in the instant matter had no duty to inquire of the Petitioner in light of Fed. R. Crim. P. 44(c), the face of the indictment which showed that co-defendant White was more extensively charged, and the evidence elicited at trial which showed that Petitioner was, at worst, an unwilling participant and that a shifting blame defense was viable in light of the relative participation of the jointly represented co-defendants. Nor can it reasonably be argued that Petitioner at any time affirmatively waived her right to the effective assistance of counsel. Defense counsel was effectively precluded from shifting the blame or arguing that Petitioner was an unwilling participant because of the damage it would have done to the co-defendant White. The only defendant that stood to gain from a "united front" was co-defendant White not the Petitioner.

The duty to inquire and advise pursuant to Fed. R. Crim. P. 44(c) is a continuing one. *Advisory Committee Notes* at p. 14. Therefore, the trial court in this matter should have conducted an inquiry before trial began when the appearance of Seymour Floyd

was entered; at the time the evidence indicated the relative participation of the co-defendants; before Petitioner testified; and at the time of sentencing.

Some circuit courts of appeal, in the absence of an inquiry in the face of joint representation shift the burden of proof onto the government to prove that defendants were not prejudiced instead of requiring defendant to prove an actual conflict of interest. *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *Hart* v. *Davenport*, 478 F.2d 203 (3d Cir. 1973); *United States* v. *Foster* (1st Cir. 1972). Therefore, a ruling by this Honorable Court is due construing Fed. R. Crim. P. 44 (c) and resolving the different approaches and burdens of proof set forth by the circuit courts of appeal below.

In the case of *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978), this Court recognized that the danger of joint representation "is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." (Emphasis in original.) In the case at bar, defense counsel was refrained from shifting the blame on co-defendant White and was compelled to refrain from exploring plea negotiations and a possible grant of immunity on behalf of Petitioner. Furthermore, because of the conflicting interests, defense counsel made no motion to sever the trial of Petitioner and co-defendant White. This Court also recognized in *Glasser* v. *United States*, 315 U.S. 60 (1942), that "the right to have the assistance of counsel is too fundamental and absolute a right to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Also in *Glasser*, *supra*, the Court stated at 71, 76 that:

> Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . to have the assistance of counsel . . ."

Of course, *Holloway*, *supra*, and *Glasser*, *supra*, are different from the case at bar because there were timely objections made at

trial but the court either failed to inquire into the possibility for conflict or failed to appoint separate counsel for defendants.

Petitioner herein agrees with the reasoning set forth by Mr. Justice Brennan in *Cuyler*, at 351, 352, whereat he presciently states:

> "the court cannot delay until a defendant or an attorney raises a problem, for the Constitution also protects defendants whose attorneys fail to consider, or choose to ignore, potential conflict problems.
>
> * * *
>
> This is necessary since it is usually the case that defendants will not know what their rights are or how to raise them. This is surely true of the defendant who may not be receiving the effective assistance of counsel as a result of conflicting duties owed to other defendants. Therefore, the trial court cannot safely assume that silence indicates a knowledgeable choice to proceed jointly. The court must at least affirmatively advise the defendants that joint representation creates potential hazards which the defendants should consider before proceeding with the representation."

It is the trial court's duty to protect criminal defendants from unscrupulous defense attorneys.

Since, *Cuyler, supra,* Fed. R. Crim. P. 44(c) took effect which imposes on the trial court an affirmative duty to inquire and advise jointly represented co-defendants of the risks inherent in joint representation. Some courts argue that the failure to conduct a hearing in and of itself is not grounds for reversal. These courts hold that a defendant must demonstrate an actual conflict of interest pursuant to *Cuyler, supra.*

This reasoning is incongruous even with the decision in *Cuyler, supra,* because the Court held in that case that the trial court had no duty to inquire of the co-defendants because it did not know or could not reasonably be expected to know of the potential for conflict in the absence of an objection or any other

indicia. *Cuyler, supra,* therefore does not preclude the reasoning that if the trial court knew or reasonably should have known of the potential for conflict but did not conduct an inquiry then it would be tantamount to an impermissible requirement of joint representation, even in the absence of an objection below. *Holloway* v. *Arkansas,* 435 U.S. 475, 487 (1978); *Glasser* v. *United States,* 315 U.S. 60 (1942).

Since *Cuyler, supra,* was decided the Court in *Wood* v. *Georgia,* 450 U.S. 261 (1980), held that the possibility of a conflict of interest was sufficiently apparent at the time of a bond revocation hearing that the trial court had a duty to inquire further into the risk for conflict. The Court vacated and remanded the case for the court to determine whether or not there was an actual conflict and a valid waiver of conflict free counsel. *Wood, supra,* substantiates Petitioner's claim that her case should at least be remanded to determine whether or not there was a valid waiver of conflict free counsel on her part.

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this most Honorable Court grant her Petition for Writ of Certiorari, or in the alternative, that the Opinion and Order of the Sixth Circuit Court of Appeals be summarily reversed and/or remanded.

Respectfully submitted,

THOMAS A. HOWARD (P15176)
Attorney for Petitioner
20830 Rutland
Southfield, Michigan 48075
(313) 552-8900

DONALD HOWARD STOLBERG
(P40698)
32330 West Twelve Mile Road
Farmington Hills, Michigan
48018

APPENDICES

Appendix A

Nos. 88-1953;1954;1955;1956; 88-2031; 88-2110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OCELIA M. PERKINS;
DONALD J. MCQUEEN;
JOYCE SCOTT;
PAMELA H. WILLIAMS;
ANDERS MIGDALECK; and
STELLA H. WARE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED: MARCH 7, 1990

BEFORE: NELSON and RYAN, Circuit Judges; and MEREDITH, District Judge.*

RYAN, J., Circuit Judge. Defendants Anders Migdaleck, Donald J. McQueen and Pamela H. Williams appeal their convictions for mail fraud, 18 U.S.C. § 1341, and interstate transportation of securities taken by fraud, 18 U.S.C. § 2314. Defendants Ocelia M. Perkins, Stella H. Ware and Joyce Scott appeal their convictions for mail fraud, 18 U.S.C. § 1341. All convictions arose from a scheme to defraud insurance companies by intentionally setting fires to residential homes located in the Detroit area in order to collect insurance proceeds. Several issues are raised on appeal but none require reversal. Accordingly, we affirm.

---

* The Honorable Ronald E. Meredith, United States District Judge for the Western District of Kentucky, sitting by designation.

Appendix A

(Nos. 88-1953-56;2031;2110)

I.

Defendant Migdaleck, a licensed contractor and owner of Town and Country Builders and Anders Construction Company purportedly organized the arson scheme and paid the participants from the insurance proceeds. Defendants McQueen, Williams and Perkins were homeowners who arranged to have fires set at their respective homes. Defendant Ware helped arrange the fire at defendant Perkins' home. In each case, claims were made with the homeowners' insurance carriers through use of mails.

On January 6, 1988, all the defendants and others were charged with mail fraud, 18 U.S.C. § 1341, and interstate transportation of securities taken by fraud, 18 U.S.C. § 2314, in a twenty-three count indictment. Defendant Midgaleck was indicted on all twenty-three counts as was Anita Vianveva Sackett, a licensed public adjuster, who worked for defendant Migdaleck. Sackett entered into a plea agreement and testified at trial in exchange for leniency. The arsonists who set the fires also testified.

The first two counts involved the January 18, 1983 arson fire at defendant McQueens' residence. Migdaleck and McQueen were charged with mail fraud and interstate transportation of securities taken by fraud. Migdaleck was acquitted and McQueen was convicted.

Counts three and four involved the February 25, 1983 arson fire at the residence of Ronald Pitts. Pitts, Migdaleck and McQueen were charged with two counts of mail fraud. Pitts pled guilty prior to trial and testified in exchange for leniency. Both Migdaleck and McQueen were convicted.

Counts five through nine involved the July 27, 1984 arson fire at White's residence. Migdaleck and White were charged with five counts of mail fraud. Both were convicted.

Counts ten through twelve involved the October 20, 1983 arson fire at defendant Williams' residence. Migdaleck, White and Williams were charged with mail fraud and two counts of interstate transportation of securities taken by fraud. Migdaleck was acquitted and White and Williams were convicted.

Counts thirteen and fourteen involved the May 11, 1983 arson fire at Perkins' home. Migdaleck, Perkins and Ware were charged with two counts of mail fraud. All were convicted.

Counts fifteen through twenty involved the January 15, 1983 arson fire at the home of Doris Lauderdale. Lauderdale and Migdaleck were charged with interstate transportation of securities taken by fraud and five counts of mail fraud. Both were acquitted.

Counts twenty-one and twenty-two involved the March 15, 1983 arson fire at the home of Joyce Manns. Migdaleck and Scott were charged with two counts of mail fraud. Migdaleck was acquitted and Scott was convicted.

Count twenty-three involved the January 18, 1984 arson fire at a residence owned by Willie Dash. Migdaleck and White were charged with mail fraud. Both were convicted.

Following the imposition of sentences, defendants appealed. Michael White's appeal was dismissed as untimely.

II. Defendant Migdaleck

A. Failure to Instruct Jury on Exculpatory Testimony.

Defendant Migdaleck contends the trial court erred in failing to properly instruct the jury, pursuant to *Cool v. United States*, 409 U.S. 100 (1972), and *United States v. Stulga*, 531 F.2d 1377 (6th Cir. 1976), *appeal after remand*, 584 F.2d 142 (6th Cir. 1978), concerning evaluation of the exculpatory testimony offered by the three arsonists.

Appendix A

(Nos. 88-1953-56;2031;2110)

The testimony of arsonists Al Meridith, Jr., Willie Weems and Adar Hassan was essentially favorable to defendant Migdaleck. The three testified that the arson fires were represented to Migdaleck as legitimate losses and all three witnesses inferred that Al Meredith, Sr. operated the scheme. However, Al Meredith, Sr. testified that Migdaleck knew about the scheme, had made Sackett a public adjustor to further the scheme, paid commissions to the arsonists, and provided the funds used to purchase the materials used to start the fires.

On appeal, the defendant Migdaleck asserts the trial court erred in failing to give an instruction which would enhance the effect of the exculpatory testimony of the three arsonists.

The court instructed the jury:

> The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. *You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.*

(Emphasis added.) This instruction was requested by defendant McQueen and is based on Devitt and Blackmar, *Federal Jury Practice and Instructions,* 3d ed, § 17.06 (1977).

At trial, after the court finished instructing the jury, counsel for defendant Migdaleck objected to the foregoing instruction, stating that the instruction that should have been given is:

> [I]f you believe the evidence of the accomplice, and you feel that that in and of itself is sufficient to satisfy you that it is proof of guilt beyond a reasonable doubt, then you may accept it.

On appeal, defendant contends that, based on his objection and requested single-sentence instruction, the trial court should have been alerted to its duty to instruct the jury on the standard for evaluating accomplice testimony pursuant to *Cool v. United States*, 409 U.S. 100 (1972), and *United States v. Stulga*, 531 F.2d 1377 (6th Cir. 1976), *appeal after remand*, 584 F.2d 142 (6th Cir. 1978). We disagree.

In *Cool*, the accomplice testified for the defense and his testimony was completely exculpatory. Over defense counsel's objection, the district court instructed the jury to consider the accomplice testimony *if* it found it true beyond a reasonable doubt. 409 U.S. at 102. The Supreme Court reversed, finding the instruction placed an improper burden on the defense, obstructed the defendant's sixth amendment right to present exculpatory accomplice testimony to the jury, and, in effect, reduced the government's burden of proof. 409 U.S. at 103, 104. In a footnote, the Court also found it confusing and unfair to instruct the jurors that they could convict on the basis of accomplice testimony without telling them they could also acquit on this basis. 409 U.S. at 103, n.4.

In *Stulga*, several accomplices testified for the government. Two of them partially exculpated defendant. The defense counsel objected to the court's instruction on accomplice testimony and specifically requested that the jury be instructed that exculpatory testimony of an accomplice did not have to be believed beyond a reasonable doubt or by a preponderance. *Id.* at 1380. The court declined to do so. On appeal, this court held the trial court committed reversible error in failing to instruct the jury on the manner in which to evaluate an accomplice's exculpatory testimony in light of the "virtual dirth of inculpatory testimony" and the "wealth of exculpatory testimony." *Id.* at 1380. This court concluded that the lack of precision in the charge could have confused the jury and led it to conclude that in order to consider

the accomplice's exculpatory testimony at all, it had to believe the testimony beyond a reasonable doubt. *Id.*[1]

Here, unlike the situation in *Stulga* or *Cool*, defense counsel's requested instruction was not a request that the jury be advised on how to evaluate exculpatory accomplice testimony (*Stulga*), or a request to instruct the jury that accomplice testimony can provide the basis of acquittal (*Cool*). Rather, defense counsel's objection and proposed instruction, in effect, asked the court to instruct the jury that it could accept inculpatory accomplice testimony if it believed the testimony beyond a reasonable doubt. It was essentially the same instruction as was given by the court, although the court's instruction stated the matter more understandably and more accurately.

We are presented then with a situation in which the defendant assigns error to the trial court's failure to instruct the jury as to the proper manner in which to evaluate exculpatory accomplice testimony, although no timely and understandable request for such an instruction was made at trial and no objection registered to its omission. Consequently, we review this assignment of error under the plain error rule. Fed. R. Crim. P. 52(b). Where, as here, no specific objection was registered at trial, reversal is required only where a miscarriage of justice would result. *United States* v. *Hook*, 781 F.2d 1166, 1172 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986). We think it is manifest that no miscarriage of justice resulted from the court's failure to instruct, sua sponte, on the manner in which the jury might have evaluated the exculpatory accomplice testimony, and defendants cite no authority to

---

[1] On appeal, following the conviction on remand, the defendant in *Stulga* again contested the court's instruction on accomplice testimony. The trial court left unchanged that portion of the instruction objected to here; instead, the court merely added that exculpatory accomplice testimony should be considered and weighed along with all other evidence and could be the bases of a not guilty verdict. In *United States* v. *Stulga*, 584 F.2d 142, 144-145 (6th Cir. 1978), this court held the instruction given by the trial court was sufficient.

the contrary. *See United States* v. *Vigi*, 515 F.2d 290 (6th Cir.), *cert. denied*, 423 U.S. 912 (1975).

B. Denial of New Trial.

Defendant Migdaleck also contends the trial court erred in failing to recognize that it could weigh the credibility of witnesses when reviewing a new trial motion on the ground that the verdict was against the great weight of the evidence. Fed. R. Crim. P. 33.

The trial court's authority in deciding a motion for a new trial on the ground that the verdict is against the great weight of the evidence, Fed. R. Crim. P. 33, is much broader than its authority on a motion for acquittal based on the sufficiency of the evidence, Fed. R. Crim. P. 29. *United States* v. *Turner*, 490 F. Supp. 583, 593 (E.D. Mich. 1979), *aff'd* (without opinion), 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States* v. *Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). In the former, the court may weigh the evidence and consider the credibility of the witnesses. *Turner*, 490 F. Supp. at 593; *Arrington*, 757 F.2d at 1485.

Motions for new trial are disfavored and they are granted only with great caution. *Turner*, 490 F. Supp. at 593. Ordinarily, a new trial should be granted only where the evidence weighs so heavily against the verdict that a miscarriage of justice would result if the verdict were allowed to stand. *Turner*, at 593; *Arrington*, at 1485. A decision on a motion for new trial will not be upset on appeal absent an abuse of discretion. *Arrington*, 757 F.2d at 1486.

The theory of defendant Migdaleck's motion is that the principal witness against him, Al Meredith, Sr., was completely unworthy of belief. At the hearing on the motion, defendant contended that without Meredith Sr.'s testimony, there was no proof defendant participated in the arsons, and the arsons were the whole crux of the case. The government contended that it had shown by circumstantial and direct evidence that defendant

Midgaleck controlled the operation in that he paid all the participants and controlled the disbursement of insurance proceeds.

The trial court denied the new trial motion for two reasons: first, the court did not believe credibility questions could be raised by a new trial motion pursuant to *United States* v. *Johnson*,[2] 487 F.2d 1278, 1280 (4th Cir. 1973), and there was no basis to substitute the court's judgment for the jury in weighing the credibility of Al Meredith, Sr.; second, the court found the other evidence of Midgaleck's guilt was sufficient to support the verdict. The court noted that the jury was quite perceptive and found defendant failed to present anything to establish that the evidence preponderated heavily against the verdict.

Defendant is correct that the trial court failed to recognize that, on a motion for new trial on the ground that the verdict is against the great weight of the evidence, the court was indeed entitled to consider the credibility of the witnesses. If the sole basis for the district court's denial of the new trial motion was that credibility was not a proper subject for the court to examine, we would be inclined to remand this case to the district court to consider the credibility question. However, the court also found that the other evidence inculpating Migdaleck was sufficient to support the verdict, a conclusion well-supported in the record. Moreover, the district court commented favorably on the jury's ability to evaluate the evidence since it acquitted defendant Migdaleck on some of the charges.

Given the record supported alternative basis for the trial court's denial of the new trial motion, and the rule that a new trial should be granted on the ground here asserted only when the evidence preponderates heavily against the verdict, we cannot say the trial court abused its discretion in denying defendant's motion.

---

[2] *Johnson* involves a new trial motion based on newly discovered evidence, not based on a verdict that is against the great weight of the evidence.

C. Constructive Amendment of Indictment.

Defendants Migdaleck and Williams contend that the trial court constructively amended the indictment when it allowed Anita Sackett to testify that Migdaleck inflated the building loss portion of insurance claims by directing the adjustor to "go heavy" on the losses and testify that the claim for the fire at White's residence was indeed inflated.

At trial, counsel for defendant Migdaleck objected to Sackett's testimony on the inflation of the building loss portion of insurance claims on relevancy grounds. The objection was overruled.

The indictment against defendants Migdaleck and White was based on the premise that defendants were involved in a scheme to defraud insurance companies by intentionally setting fires to residential homes and using the mails to collect the insurance proceeds. The indictment did not allege that defendants inflated the building portion of the insurance claims.

A court may not require a defendant to be tried on charges that are not included in the indictment. *Stirone* v. *United States*, 361 U.S. 212 (1960). A constructive amendment occurs when the charging terms of the indictment are, in effect, altered by the prosecutor or the court. *United States* v. *Atisha*, 804 F.2d 920, 927 (6th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987) (quoting *United States* v. *Jones*, 647 F.2d 696, 700 (6th Cir.), *cert. denied*, 454 U.S. 898 (1981)). A variance occurs when the charging terms of the indictment are left unaltered but the evidence offered at trial proves materially different from those alleged in the indictment. *Id.*

A constructive amendment is per se prejudicial but a variance is not grounds for reversal unless the defendant's substantial rights are affected. *United States* v. *Goldfarb*, 643 F.2d 422, 433 (6th Cir.), *cert. denied*, 454 U.S. 860 (1981).

Appendix A

(Nos. 88-1953-56;2031;2110)

To determine whether a constructive amendment occurred, the court must decide whether *the elements of the crime charged* were altered. *Atisha*, 804 F.2d at 927 (citation omitted). (Emphasis added.)

The elements the government is required to prove for mail fraud are a scheme to defraud and use of the mails to execute or further the scheme. *United States* v. *Schilling*, 561 F.2d 659, 661 (6th Cir. 1977).

Defendants contend the introduction of evidence that the building loss portion of the claims were inflated, in effect, created an alternate theory for the jury to find defendants had entered into a scheme to defraud and, thus, constituted a constructive amendment of the indictment. The prosecution contends the trial court did not err in admitting the evidence to show the fraudulent nature of the scheme. The government contends the evidence did not change the fact that the scheme to defraud was based on arson but, instead, showed defendants' relationship to the scheme and how they profited by it.

We find that the mail fraud charge in the indictment was the same charge described to the jury and conclude that the introduction of the testimony on claim inflation did not change the basic theory of the fraudulent scheme so as to constitute a constructive amendment of the indictment. *Atisha*, 804 F.2d at 927. Moreover, we hold that had the introduction of the evidence constituted an impermissible variance, any error in admitting the evidence was harmless, *United States* v. *Mahar*, 801 F.2d 1477, 1503 (6th Cir. 1986), since the testimony at trial centered on the scheme to commit arson, the underlying basis for the mail fraud charge set forth in the indictment.

III. Defendant Williams' Denial of Effective Assistance of Counsel.

Defendant Williams also contends that she was denied effective assistance of counsel because her attorney also represented defendant White. Specifically, she contends an actual conflict of interest existed because her counsel failed to cross-examine Meredith, Sr. and arsonist Willie Weems, although their testimony made the defense of shifting the blame to White a viable option. Defendant claims the trial court failed to inquire about the joint representation and failed to advise defendant about the right to separate representation as required by Fed. R. of Crim. P. 44(c). Williams made no objection below to the joint representation.

Multiple representation is not a per se violation of the sixth amendment right to effective assistance of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). To establish a sixth amendment violation, a defendant who raises no objection below must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980).

At oral argument, defendant conceded that the trial court's failure to conduct a Fed. R. Crim. P. 44(c) inquiry did not automatically require reversal. This is in accord with the position of those circuits which have addressed the issue. *See United States v. Crespo de Llano*, 830 F.2d 1532, 1539 (9th Cir.), *reh. den.*, 838 F.2d 1006 (9th Cir. 1987) (citations omitted). It is also in accord with the advisory committee notes to Rule 44(c) which state:

> The failure in a particular case to conduct a rule 44(c) inquiry, would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant.

Williams argues that counsel's failure to cross-examine Meredith, Sr. and Weems demonstrated an actual conflict of interest

because their testimony revealed that White was more culpable then Williams thus enhancing the likelihood of success of the shifting blame defense.

A conflict of interest must be actual, not hypothetical or merely possible. *Cuyler*, 446 at 350; *United States* v. *Carter*, 721 F.2d 1514, 1537 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984). The defendant must demonstrate that the interests of the jointly represented defendants were so inconsistent that the pursuit of a plausible argument in favor of one would damage the defense of the other. *Carter* at 1536; *United States* v. *Romero*, 780 F.2d 981, 986 (11th Cir. 1986). In order for a shifting blame defense to give rise to an actual conflict of interest, the defense must be realistically available to defense counsel. *United States* v. *Carter*, 721 F.2d at 1537; *Romero*, at 986.

Defendant Williams relies heavily on the failure of her trial counsel to cross-examine Meredith, Sr. and Weems on the roles Williams and White played in connection with the fire at the residence owned by Williams. At trial, Meredith, Sr. testified that Williams wanted no part in the fire at first, but stood in line with the rest of the perpetrators to collect her share of the commission after the fire occurred. Weems, the arsonist, testified that prior to the fire, Williams had him review the insurance policy to make sure the property was adequately insured; Williams agreed to the fire and paid Weems a deposit, a sum Weems required to insure Williams was definite about the plan. Williams testified and denied ever speaking with Meredith, Sr. or Weems prior to the fire, and denied she was involved in any fraudulent scheme to set her home on fire.

We agree that the evidence of defendant White's participation in the overall scheme, and in particular his involvement in the Williams' fire, was stronger than the evidence the government had against Williams. However, that does not diminish the force of the evidence that Williams was identified as a participant in the scheme to set the home she owned on fire.

We think defendant Williams has failed to show that she stood to gain significantly by abandoning the defense pursued by her trial counsel. She does not contend that her co-defendant would have exculpated her. Her only allegation of actual conflict relates to her contention that White is more blameworthy than she is. She does not contend the evidence against her was insufficient to convict. We conclude defendant Williams failed to demonstrate an actual conflict of interest. *See Carter*, 721 F.2d at 1537, *United States* v. *Benavidez*, 664 F.2d 1255, 1260-61 (5th Cir), *reh. denied*, 671 F.2d 1380 (5th Cir.), *cert. denied*, 457 U.S. 1121 and 457 U.S. 1135 (1982).

IV. Defendant Scott

A. Admission of the Check Evidence.

Defendant Scott contends the admission into evidence of two checks written by Anders Construction Company to Scott and a 1983 check registry from Anders Construction Company was improper because the evidence was irrelevant, prejudicial, and constituted inadmissible evidence of other crimes and bad acts. Fed. R. Evid. 404(b). At trial, defendant contended the check evidence was inadmissible because the checks were not issued within the time period charged in the indictment and because the checks and the check registry suggested the inference that she was involved in other arson fires for which she was not charged. Defense counsel also contended that the evidence was used to suggest guilt by association.

The government contends that the relevance of the two checks was to show that defendant Scott was not just Migdaleck's secretary, as was claimed, but was paid commissions for bringing business to Anders Construction Company, as were other "programmers," and the check registry was introduced to show the relationship between the various parties to the fraudulent scheme.

The trial court held the checks were relevant and their probative value was not outweighed by their prejudicial effect.

A trial court does not err in admitting evidence that has a tendency to make more or less probable a material proposition for which it is offered, unless it is shown that the probative value of the evidence is substantially outweighed by its prejudicial effect. Fed. R. Evid. 401, 403.

We conclude this evidence was relevant and its probative value was not substantially outweighed by its prejudicial effect. There was strong circumstantial evidence, specifically the testimony of Meredith, Sr. and Hassan, that Scott was a principal in the scheme to burn down the premises on Lauder Avenue on March 15, 1983. The essence of Scott's defense was that she was merely a secretary at Anders Construction and was not involved in the arson for profit scheme. The court admitted the challenged checks upon the government's argument that the checks were admissible as proof that Scott was more than just a secretary, but was a "programmer" being paid commission for bringing arson repair business to Migdaleck, just as other "programmers" were. The check register for 1983 was admitted in order to show that commission checks were written to Meredith, Sr., and Jr., Weems, Hassan, Scott, and other defendants in the case at or near the time of the fire to which each was connected in the testimony, and to show the relationship between the various defendants during 1983. An additional reason the check register was offered and admitted is that the government had possession of some, but not all, of the checks relevant to the arson schemes, and wished to prove, by introduction of the check register, the pattern of issuance of checks related to arson schemes.

We think both the two checks and the 1983 check register were shown to be relevant and were therefore admissible. Moreover, the defendant Scott has failed to demonstrate that the relevance of the three exhibits was substantially outweighed by the possible prejudicial effect of suggesting Scott's involvement in

a still wider scheme of arson for profit than the March 15, 1983 Lauder Avenue fire, a point never argued by the government. We conclude the trial court did not err in admitting the challenged exhibits.

B. Sufficiency of the Evidence.

Defendant Scott's second issue on appeal is tied to her first. She contends there was insufficient evidence to convict her of mail fraud because the government failed to prove she entered into a scheme with Migdaleck to defraud on the dates charged in the indictment. Scott contends the government's case rested on the two challenged checks and the testimony of immunized convicted arsonists, whose credibility was highly questioned. She notes that defendant Migdaleck was acquitted of the charges on which she was convicted.

In order to convict a defendant of mail fraud, the prosecution must prove a scheme to defraud and use of the mails to execute or further the scheme. *United States* v. *Schilling*, 561 F.2d 659, 661 (6th Cir. 1977). Defendant Scott does not contest the sufficiency of the evidence on the use of the mails element of the mail fraud charge.

This court reviews a sufficiency of the evidence claim by determining whether, in viewing the evidence in a light most favorable to the prosecution, a rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), *reh. denied*, 444 U.S. 890 (1979).

Al Meredith, Sr. testified that he spoke with defendant Scott about the March 15, 1983 fire at Joyce Manns' house before it occurred. Scott introduced Manns as a "customer." During the conversation between Meredith, Sr., Manns and Scott, Meredith, Sr. checked Manns' insurance policy and discussed Manns' potential recovery from the fire and where Manns would stay while repairs were being made.

Adar Hassan testified that Meredith, Sr. asked him to meet Scott at Manns' home and set the fire. Hassan met Scott at Manns' home on the day of the fire, went in and, while Scott and the occupants remained downstairs, went upstairs and set the fire.

The two checks were admitted to show defendant Scott was paid commissions by defendant Migdaleck.

The evidence, taken in a light most favorable to the prosecution, establishes defendant Scott was a participant in the scheme to defraud the insurance company and is sufficient to convict her of two counts of mail fraud, 18 U.S.C. § 1341.

V. Defendant McQueen's objection to the Jury Instruction.

Defendant McQueen contends the trial court failed to instruct the jury that the interstate movement of the securities must have been reasonably foreseeable by defendant in order to convict him of interstate transportation of securities taken by fraud, 18 U.S.C. § 2314. The court instructed the jury:

> If the evidence establishes to your satisfaction beyond a reasonable doubt that a Defendant knowingly caused the securities . . . to be transported from one state to another, then the Defendant caused the securities to be transported in interstate commerce within the meaning of the statute . . . .
>
> *[I]t is not necessary that the Defendant knew the security would be transported in interstate commerce.*
>
> Of course, it is common knowledge that checks or drafts drawn on an out-of-state bank will be sent to that bank for collection. If . . . a Defendant knowingly caused the checks . . . to be put in interstate commerce, then . . . he has caused it to be transported in interstate commerce within the meaning of the law.

(Emphasis added.) Defendant objected to the instruction, stating that the instruction should have included language that the interstate transportation of the documents must have been reasonably foreseeable to defendant.

The majority of courts addressing the matter have held that the interstate transportation requirement of § 2314 is merely to insure federal jurisdiction and does not impose a requirement that the government prove that the interstate transportation was in any way reasonably foreseeable. *United States* v. *White*, 451 F.2d 559, 560 (6th Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); *United States* v. *Kibby*, 848 F.2d 920, 923 (8th Cir. 1988); *United States* v. *Squires*, 581 F.2d 408, 409-10 (4th Cir. 1978).

Therefore, we conclude the trial court did not err in failing to instruct the jury that the foreseeability of the interstate transportation of the securities is required to convict defendant of interstate transportation of securities taken by fraud, 18 U.S.C. § 2314.

VI. Defendants Perkins and Ware Denial of Severance Motion.

Defendants Perkins and Ware argue that joinder was improper under Fed. R. Crim. P. 8(b) since they did not participate in the "same series of acts or transactions" as the other defendants. Alternatively, defendants argues that even if joinder was proper under Rule 8(b), severance should have been granted under Fed. R. Crim. P. 14 because of the substantial prejudice to defendants resulting from the jury considering the evidence against other persons in order to convict the defendants.

At trial, all defendants joined in the motion asserting improper joinder, Rule 8(b), and requesting severance due to prejudice, Rule 14; however, only Perkins and Ware address this issue on appeal. The district court held that there was a factual similarity in the counts; the proofs overlapped; the participants had the same objective, to burn homes and collect the insurance;

and judicial economy would best be served by joinder. The court further held that the defendants failed to make a strong showing of substantial prejudice and declined to sever the trial under Rule 14.

Joinder of multiple defendants under Rule 8(b) is proper if each count in the indictment arises out of the same series of acts or transactions. *United States* v. *Hatcher*, 680 F.2d 438, 441 (6th Cir. 1982). A group of acts or transactions constitutes a series if they are logically related and involve overlapping proofs. *United States* v. *Swift*, 809 F.2d 320, 322 (6th Cir. 1987) (citing *United States* v. *Johnson*, 763 F.2d 773, 776 (6th Cir.), *cert. denied*, 474 U.S. 862 (1985)). Rule 8(b) is broadly construed in favor of joinder because Rule 14 provides protection against prejudicial joinder. *Swift*, at 322. A significant consideration is whether joinder would promote judicial economy. *Id.* Review of a district court's refusal to sever pursuant to Rule 8 is reviewed for an error of law but is subject to the harmless error standard. *Hatcher*, 680 F.2d at 442.

We conclude joinder was proper. All twenty-three counts of the indictment involved a series of schemes to defraud insurance companies by intentionally setting fire to residential dwellings in order to collect insurance proceeds. The record reveals that defendants Perkins and Ware, as well as the other defendants, were connected to the kingpin of the entire scheme to defraud, defendant Migdaleck, and the mail fraud counts against Perkins and Ware were logically interrelated with the other acts charged in the indictment. *See Johnson*, 763 F.2d at 776. Moreover, joinder served the interest of judicial economy. *See, Swift*, 809 F.2d at 322. We conclude, therefore, that joinder was proper under Rule 8(b).

Under Fed. R. Crim, P. 14, the trial court may order severance if a defendant is prejudiced by joinder of defendants or claims. *Swift*, 809 F.2d at 322. This court reviews the district court's denial of a severance motion under Rule 14 for an abuse of

discretion, and to establish an abuse of discretion the defendant must make a strong showing of prejudice. *Id.* The defendant must show the jury was not able to separate and treat distinctively evidence relevant to each defendant and even if some potential jury confusion is established, this must be balanced against society's need for speedy and efficient trials. *Id.* (quoting *United States* v. *Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985), *cert. denied*, 474 U.S. 1068, and 474 U.S. 1069, and 475 U.S. 1017 (1986)).

Defendants' basic contention on appeal is that they were prejudiced by the spillover of evidence relating to the other arson fires because the evidence against them was not overwhelming.

Albert Meredith, Jr. testified that defendant Ware contacted him and told him that defendant Perkins wished to speak to him about burning a dwelling. Meredith, Jr. spoke to Perkins in Ware's presence and discussed the arson, the fire repairs, and the monetary advancement. They proceeded to Perkins' home where Meredith, Jr. examined Perkins' insurance policy and determined where the fire should be set. Thereafter, the fire was set by Adar Hassan. Perkins admitted Meredith, Jr., Hassan and Ware into her home and then Perkins and Ware left. Hassan set the fire.

Adar Hassan testified that he, Meredith, Jr. and Ware drove to Perkins home on the day of the fire. They discussed what type of fire was required. At Perkins' home, Hassan discussed the location of the fire with defendant Perkins and then asked everyone to leave while he prepared the fire.

"Absent a showing of substantial prejudice, spillover of evidence from one case to another does not require severance." *Johnson*, 763 F.2d at 777 (quoting *Gallo*, 763 F.2d at 1526).

In view of the foregoing evidence, any spillover evidence of other schemes to intentionally set fire to residential dwellings cannot establish substantial prejudice. Moreover, the district court gave the jury cautionary instructions regarding the separate consideration to be give to each defendant. A jury is presumed

capable of sorting out evidence and considering each count and each defendant separately. *Swift*, 809 F.2d at 323. That the jury did so in the instant case is evidenced by the fact that one homeowner was acquitted and defendant Migdaleck was acquitted in part.

As this court said in *Swift*, "even if there is some potential for jury confusion, it is small and does not outweigh 'society's need for speedy and efficient trials.' " *Id.* (quoting *Gallo*, 763 F.2d at 1525). The trial court did not abuse its discretion in denying defendants' severance motion under Rule 14.

VII. Defendant Perkins' Co-conspirator Hearsay Objection.

Defendant Perkins contends that the trial court erred in admitting the hearsay testimony of Adar Hassan and Albert Meredith, Jr.

Defendant did not object to the testimony by Hassan that he spoke to Perkins at her home on the day of the fire and Perkins had told him she wanted the fire set in the kitchen. Thus, we are not obligated to address this issue. In all events, the testimony appears admissible as an admission under Fed. R. Evid. 801(d)(2)(A).

Defendant did object to the testimony of Albert Meredith, Jr. regarding Perkins' agreement to proceed with plans to set a fire at her home.

Meredith, Jr. testified that he had spoken with defendant Perkins and defendant Ware about the possibility of setting a fire at Perkins' residence. He reviewed Perkins' insurance policy and inspected her home to select a location for the fire. He testified that Perkins took some time to think about it but eventually he heard from defendant Ware that Perkins was ready to have a fire.

Defendant objected to Meredith, Jr. testifying as to what defendant Ware told him Perkins said as the testimony was hearsay. The court stated the testimony was admissible under Fed. R. Evid. 801(d)(2)(E) as a statement of a co-conspirator.

On appeal, defendant Perkins contends the trial court failed to make the preliminary determination required for the admission of a co-conspirator's statement; namely, that a conspiracy existed, and that the statement was made during the course of and in furtherance of the conspiracy.

Fed. R. of Evid. 801(d)(2)(E) provides:

> (d) A statement is not hearsay if —
>
> . . . .
>
> (2) The statement is offered against a party and is
>
> . . . .
>
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

In *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978), this court held that the admissibility of a co-conspirator's statement under Rule 801(d)(2)(E) is for the court to decide under Fed. R. Evid. 104(a) and the preliminary question to be answered is whether the co-conspirator's statement falls within the Rule, that is, whether a conspiracy existed and whether the statement was made in the furtherance of the conspiracy. *Id.* at 984, 985.

The United States Supreme Court in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), agreed that Rule 104(a) governs the admissibility of a co-conspirator's statement and a preponderance of the evidence standard applies. *Id.* at 175. The Court also held that the trial court may consider the out-of-court statement of the alleged co-conspirator sought to be admitted when making its preliminary determination on whether the co-conspirator state-

ment is admissible under 801(d)(2)(E). *Id.* at 180. However, the court declined to decide whether the lower court could rely solely upon the co-conspirator's hearsay statement to establish that a conspiracy existed by a preponderance of the evidence under Rule 104(a). *Id.*

In this case, defendant Perkins contends that Meredith, Jr.'s hearsay testimony that Ware told him that Perkins said she was ready to have the fire was the only testimony linking Perkins to the conspiracy. That is not the case. Meredith, Jr. testified that he spoke with Perkins about a plan to set fire to her home prior to the time the alleged statement by Ware was made, and Hassan testified that he discussed the location of the fire with Perkins the day the fire was set.

In light of the above testimony, the hearsay statement of Meredith, Jr., that Ware said that Perkins said she was ready to have the fire, is a statement in furtherance of the conspiracy, made by a co-conspirator during the course of the conspiracy. Nor is the Meredith, Jr. testimony challengable as double hearsay, since the Perkins statement to Ware is "not hearsay" under Fed. R. Evid. 801(d)(2)(A), since it is a statement of admission. Therefore, the trial court did not abuse its discretion in admitting the co-conspirator statements as evidence. *See United States* v. *Rios*, 842 F.2d 868, 874 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 840 (1989).

Defendant Perkins also contends that the trial court failed to make a determination on the record that sufficient testimony existed to connect Perkins with the conspiracy charge, when the court held that Meredith, Jr. could testify as to what Ware told him Perkins said under the co-conspirator exception to the hearsay rule, 801(d)(2)(E). The short answer to Perkins' contention is that the court, in passing upon the challenge to the Meredith, Jr. testimony, was not obligated to announce on the record the preliminary finding of fact which conditioned the admissibility of the testimony under Fed. R. Evid. 801(d)(2)(F).

See United States v. *Curro*, 847 F.2d 325, 328 (6th Cir.), *cert. denied*, 109 S.Ct. 116 (1988).

VIII. Trial Court Vouched for Prosecutor.

All defendants except Scott contend the trial court abused its discretion in failing to grant a mistrial on the basis that the court vouched for the credibility of the prosecution when, in response to a request by counsel for defendant Ware that she be allowed to verify after each day of trial that each exhibit admitted that day was actually received in evidence, the court said it would rely on the honesty of the prosecutor and denied counsel's request.

"The decision to order a mistrial rests in the trial court's discretion." *Hamm* v. *Jabe*, 706 F.2d 765, 767 (6th Cir. 1983).

During the direct examination of Al Meredith, Sr., the prosecution moved to admit certain documentary evidence. Counsel for one defendant asked permission to examine the documents. It was revealed that not all defense counsel were given a copy of the prosecution's proposed exhibits; instead, the exhibits were delivered to Migdaleck's attorney to circulate among defense counsel. The court required the prosecution to provide each defendant with a copy of all the exhibits. Counsel for defendant Ware then inquired if counsel could, after each day of trial, verify that each admitted exhibit was used.[3] The court said:

> I am going to rely on the United States attorney to be honest. He always has been. He always will be.

Outside the presence of the jury, defendants moved for mistrial asserting the court vouched for the credibility of the prosecution. The court denied the motion.

---

[3] Counsel for defendant Ware explained at oral argument that "used" meant "received."

(Nos. 88-1953-56;2031;2110)

As the Supreme Court said in *Glasser* v. *United States*, 315 U.S. 60 (1942), *reh. denied*, 315 U.S. 827 (1942):

> Perhaps the court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the *substantial rights of the petitioners were not affected.* The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting.

Id. at 83. (Citations omitted; emphasis added.)

This was an isolated comment in a rather lengthy trial and the comment was made during a general discussion regarding the identification and introduction of the prosecution's exhibits. Moreover, the court, in its instructions to the jury, favorably commented upon the professionalism of every attorney. We do not think the cited comment by the trial court denied defendants a fair trial.

We **AFFIRM.**

Appendix B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

vs. 88-CR-80012-04

PAMILA WILLIAMS,
Defendant.

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date September 23, 1988 with counsel Seymour Floyd.

There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense(s) of Mail Fraud, 18:1341 and Interstate Transportation of Securities Taken by Fraud, 18:2314.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered: With respect to Count 10 - three (3) years imprisonment, plus a fine of $5,000.00 be imposed. With respect to Count 11 - three (3) years imprisonment to run concurrently with sentence imposed in Count 10. With respect to Count 12 - Imposition of sentence is suspended, Defendant placed on five (5) years probation to run consecutively to sentence imposed in Count 10. Defendant to make full restitution in the amount of $31,938.00 in 60 monthly installments payments of $532.30.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation

period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, Defendant is to surrender to the designated institution on October 31, 1988 by 9:00 a.m.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

HORACE W. GILMORE
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

vs.

88-CR-80012-04

MICHAEL SAMUEL WHITE,
Defendant.

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date September 23, 1988 with counsel Seymour Floyd.

There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense(s) of Counts 5 through 10 and 23: Mail Fraud; 18:USC:1341 and Counts 11 and 12: Interstate Transportation of Securities Taken by Fraud

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment as follows: With respect to Count 5 - for a period of five (5) years; with respect to Count 6 - for a period of five (5) years, which is to run consecutively for a total of ten (10) years; with respect to Counts 7 through 10 and 23 - for a period of five (5) years, which is to run concurrently with the sentence imposed in counts 5 and 6; with respect to counts 11 and 12, five (5) years each, the imposition of sentence is suspended and he is placed on probation for a period of five (5) years, to be consecutively with the sentence imposed in counts 5 and 6.

Defendant is to make full restitution in the amount of $27,560.18, within the first 58 months of probation at a monthly rate of $492.42.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, defendant be taken into custody immediately.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

HORACE W. GILMORE
United States District Judge

Appendix D

AFFIDAVIT OF PETITIONER

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

NOW COMES Petitioner, PAMILA WILLIAMS, being first duly sworn, deposes and says as follows:

1. That at no time did Judge Gilmore advise me of the risks for conflict of interest inherent in having Mr. Seymour Floyd represent me and my cousin, Michael White.

2. That at no time did my attorney, Mr. Seymour Floyd advise me of the risks for conflict of interest inherent in his joint representation of me and Michael White.

3. That if I had known of the potential for conflict of interest I would have chosen to have separate representation.

4. That Mr. Floyd was retained and paid for me by Michael White's sister, Ms. Gloria White.

5. That Mr. Floyd was also representing Gloria White in a civil action at the same time he was representing me and Michael White on this criminal case.

6. That at no time did Mr. Floyd convey to me the possibility for a plea agreement or of the possibility of being granted immunity in exchange for my testimony.

7. That if I could have compelled Michael White to testify in my behalf he would have exonerated me of the charges.

8. That I am not guilty of the charges for which I have been convicted.

Further, deponent sayeth not.

PAMILA WILLIAMS

Subscribed and sworn to before me
this day of June, 1990.

(2)

No. 89-1922

In the Supreme Court of the United States

OCTOBER TERM, 1990

PAMILA WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's attorney had an actual conflict of interest that adversely affected his performance at trial because he represented both petitioner and one of her co-defendants.

2. Whether petitioner is entitled to automatic reversal of her convictions because the district court did not inquire into the joint representation or inform petitioner of her right to separate counsel, as required by Fed. R. Crim. P. 44(c).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1922

PAMILA WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is unpublished, but the decision is noted at 897 F.2d 530 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1990. The petition for a writ of certiorari was filed on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and two counts of interstate transportation of securities taken by fraud, in violation of 18 U.S.C. 2314. She was sentenced to two concurrent terms of three years' imprisonment, to be followed by a five year term of probation on the third count. She also was ordered to make restitution in the amount of $31,938. Pet. App. 25a-26a. The court of appeals affirmed. Pet. App. 1a-24a.

1. The evidence at trial is summarized in the opinion of the court of appeals. Pet. App. 2a-3a, 12a. It established that petitioner participated in an arson scheme, pursuant to which the participants would defraud insurance companies by setting fire to residences in the Detroit area in order to collect insurance proceeds. Co-defendant Anders Migdaleck, a licensed contractor and owner of Town and Country Builders and Anders Construction Company, organized the arson scheme and used the insurance proceeds to pay the participants. Petitioner arranged through her cousin, co-defendant Michael White, to have her house set on fire. Before the fire, petitioner had Willie Weems, the arsonist, review her insurance policy to make sure that the property was adequately insured, and petitioner paid Weems the deposit he required to assure that she was committed to the plan. *Id.* at 12a. Following the fire, petitioner attended a meeting with Migdaleck, Weems, White, and Albert Meredith, Sr. At that meeting, petitioner and the other participants received their commissions from Migdaleck, and petitioner entered into a contract with Town and Country Builders (which she later

cancelled) to repair her fire-damaged house. *Ibid.*; 1 Tr. 44, 46-47.

2. Petitioner and White were represented at trial by the same attorney, and they offered the common defense of nonparticipation in the arson scheme. Petitioner did not object to the joint representation, and the district court did not inquire into it or inform petitioner of her right to separate counsel, as required by Fed. R. Crim. P. 44(c).[1]

On appeal, petitioner took issue for the first time with the joint representation, contending that her attorney had an impermissible conflict of interest. She pointed to her attorney's failure to cross-examine government witnesses Weems and Meredith, whose testimony, she argued, made viable the defense of shifting the blame to White. The court of appeals rejected that claim. It first noted that petitioner had conceded on appeal that the trial court's failure to make the required inquiry under Rule 44(c) did not in itself require automatic reversal. Pet. App. 11a. The court further concluded that petitioner had failed to demonstrate an actual conflict of interest. It discerned no likelihood that a blame-shifting defense would have succeeded or that petitioner stood to gain by abandoning the defense of noninvolvement pursued by her trial counsel, since Meredith and Weems both testified about petitioner's involvement and she did not contend that co-defendant White would have exculpated her. *Id.* at 12a-13a.

---

[1] Rule 44(c) provides that in cases of joint representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation."

ARGUMENT

1. Petitioner contends (Pet. 6-9) that she was denied her Sixth Amendment right to the effective assistance of counsel because her trial attorney had a conflict of interest arising from his joint representation of petitioner and White. We note as an initial matter that objections to trial counsel's performance should ordinarily be presented in the first instance to the district court, in a motion under 28 U.S.C. 2255, so that a record may be developed and appropriate findings made.[2] Here, because petitioner raised her Sixth Amendment claim for the first time on appeal, no record has been developed on petitioner's claim, including findings regarding the viability of the defense petitioner now asserts her attorney should have pursued and the attorney's reasons for not pursuing it. In any event, on the present record the court of appeals correctly rejected petitioner's conflict-of-interest claim.

The legal principles governing conflict-of-interest claims are well established and are not disputed by petitioner. Joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Burger* v. *Kemp*, 483 U.S. 776, 783 (1987) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978)). In order to establish a constitutional violation, a defendant who raised no objection at trial must show that his attorney " 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Burger* v. *Kemp*, 483 U.S. at 783 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984)); see also *Cuyler* v. *Sullivan*, 446 U.S. 335,

[2] See our Brief in Opposition, No. 89-1040, in *Chappell* v. *United States*, vacated and remanded, 110 S. Ct. 1800 (1990).

346-347, 350 (1980). The courts generally presume that counsel "is fully conscious of the overarching duty of complete loyalty to his or her client," and they "appropriately and 'necessarily rely in large measure upon the good faith and good judgment of defense counsel.'" *Burger* v. *Kemp*, 483 U.S. at 784 (quoting *Cuyler* v. *Sullivan*, 446 U.S. at 347).

An actual conflict of interest is present as a result of joint representation "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." *United States* v. *Benavidez*, 664 F.2d 1255, 1260 (5th Cir.) (quoting *Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1972)), cert. denied, 457 U.S. 1121 (1982). See also *United States* v. *Carter*, 721 F.2d 1514, 1536 (11th Cir.), cert. denied, 469 U.S. 819 (1984); *Brien* v. *United States*, 695 F.2d 10, 15 (1st Cir. 1982). In an attempt to establish such an actual conflict of interest, petitioner argues that, because of the joint representation, her attorney failed to adopt a strategy of shifting the blame to White. She claims that a blame-shifting defense would have been viable based on Meredith's testimony that she was initially reluctant to become involved in the arson scheme, Weems' testimony that he never spoke to her face-to-face prior to the fire, and evidence that she ultimately cancelled her repair contract with Town and Country Builders.

The court of appeals correctly concluded that petitioner did not have a plausible blame-shifting defense. First, although Meredith did testify that petitioner initially wanted no part of the arson scheme, he also testified about her attendance at the post-fire meeting, her receipt of a commission payment from Migdaleck

for her participation in the scheme, and her signing of the repair contract with Town and Country Builders. Pet. App. 12a; 1 Tr. 44-45. Meredith's testimony therefore provided no basis for a defense of shifting the entire blame to White. Nor did petitioner have anything to gain from highlighting her failure to have a face-to-face meeting with Weems prior to the fire. Weems testified that he explicitly warned petitioner over the telephone not to meet with him and that, during the same conversation, she arranged to have Weems review her insurance policy and to pay Weems a deposit to demonstrate her commitment to the scheme. Pet. App. 12a; 5 Tr. 542-544. Finally, evidence of petitioner's cancellation of the repair contract, which occurred after the fire and after her receipt of a commission from Magdaleck, would not have supported a viable blame-shifting defense.[3]

The government did present a stronger case against White than against petitioner. But, as the court of appeals observed, that "does not diminish the force

---

[3] In *Cuyler* v. *Sullivan*, 446 U.S. at 349-350, the Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." The decision below is consistent with that principle, because the court of appeals nowhere indicated that prejudice is a component of a conflict-of-interest claim. The court did note petitioner's failure to challenge the sufficiency of the evidence against her, but only to bolster its conclusion that petitioner did not have a plausible defense simply because White was more blameworthy than she was. Pet. App. 13a. Accordingly, contrary to petitioner's contention (Pet. 9), the decision below does not conflict with *United States* v. *Romero*, 780 F.2d 981 (11th Cir. 1986). There, although the court did not require a showing of prejudice in order to establish a conflict of interest, it did require a showing that the defense precluded by the alleged conflict of interest was "feasible." *Id.* at 986.

of the evidence that [petitioner] was identified as a participant in the scheme to set the home she owned on fire." Pet. App. 12a. In short, the court of appeals, applying established legal principles governing conflict-of-interest claims, correctly concluded that petitioner did not stand to gain by abandoning her common defense with White and pursuing a defense that attempted to shift the entire blame to White.[4] Petitioner therefore has not shown the existence of an actual conflict of interest. Nor has she shown that any such conflict adversely affected counsel's performance at trial. The witnesses whom she says counsel should have specifically cross-examined testified to the involvement of both White and petitioner. Petitioner has pointed to nothing to suggest that their testimony on cross-examination would have supported the notion that petitioner was not involved in the scheme at all. The court of appeals' fact-bound determination on the present record therefore does not warrant review by this Court.

2. Petitioner next contends (Pet. 9-13) that even if she failed to establish the existence of an actual conflict of interest, her convictions should be reversed because of the district court's failure to conduct an inquiry under Fed. R. Crim. P. 44(c). This submission is inconsistent with petitioner's concession at

---

[4] Petitioner cites *United States* v. *Cirrincione*, 780 F.2d 620 (7th Cir. 1985), for the proposition that "arson cases are classical examples for conflict of interest where the defense strategy of shifting the blame is most often employed." Pet. 8. Nothing in *Cirrincione* suggests that actual conflicts of interest or blame-shifting defenses are more common or viable in arson cases, and indeed the *Cirrincione* court found no conflict. 780 F.2d at 628-631. Likewise, on the facts of this case, a blame-shifting defense could not realistically have succeeded in exonerating petitioner.

oral argument in the court of appeals that the district court's failure to follow Rule 44(c) did not require automatic reversal of her convictions. See Pet. App. 11a. It also is without merit.

The courts that have addressed the issue have uniformly held that the failure to comply with Rule 44(c) requires reversal only if the defendant can show that the noncompliance resulted in a Sixth Amendment violation—that is, that an actual conflict of interest adversely affected his lawyer's performance. *United States* v. *Arias*, 678 F.2d 1202, 1205 (4th Cir.), cert. denied, 459 U.S. 910 (1982); *United States* v. *Holley*, 826 F.2d 331, 333 (5th Cir. 1987), cert. denied, 485 U.S. 960 (1988); *United States* v. *Benavidez*, 664 F.2d at 1258-1259; *United States* v. *Bradshaw*, 719 F.2d 907, 915 (7th Cir. 1983); *United States* v. *Mooney*, 769 F.2d 496, 499 (8th Cir. 1985); *United States* v. *Crespo de Llano*, 838 F.2d 1006, 1013 (9th Cir. 1987); *United States* v. *Burney*, 756 F.2d 787, 791 (10th Cir. 1985); *United States* v. *Romero*, 780 F.2d 981, 985 (11th Cir. 1986); *United States* v. *Alvarez*, 696 F.2d 1307, 1309 (11th Cir.), cert. denied, 461 U.S. 907 (1983). Petitioner failed to carry that burden.

The decisions rejecting the automatic reversal rule are correct. As the Advisory Committee Note to the 1979 Amendment explains (18 U.S.C. App. at 823), Rule 44(c) was adopted to "establish[] a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel." The Rule thus was designed as a "prophylactic measure, compliance with which would reduce the number of appeals by defendants who initially

desired joint representation but later claimed that such representation was not in their best interests." *United States* v. *Crespo de Llano*, 838 F.2d at 1013. The Rule's purpose of avoiding conflicts of interest that could lead to post-conviction claims would not be served by a requirement of automatic reversal. As the Fifth Circuit observed, "it would be a distortion of the purpose of Rule 44(c) to hold that failure to comply with the rule is in itself reversible error without requiring any showing that [the] defendant has been denied the Sixth Amendment right that the rule was designed to protect." *United States* v. *Benavidez*, 664 F.2d at 1259. Indeed, the Advisory Committee Note to the 1979 Amendment is explicit on this point: "The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." 18 U.S.C. App. at 826.

Petitioner's reliance (Pet. 13) on *Wood* v. *Georgia*, 450 U.S. 261 (1980), is unavailing. In *Wood*, the Court held that the likelihood of a conflict of interest was sufficiently apparent at the time of the defendants' probation-revocation hearing to impose on the trial court a duty to inquire further. *Id.* at 272. Because such an inquiry had not been conducted, the Court remanded the case to the trial court with instructions to hold a new revocation hearing if it determined that an actual conflict of interest existed and that there was no valid waiver of the right to separate counsel. *Id.* at 273-274. The Court did not require automatic reversal because of the failure to conduct an inquiry. Accordingly, far from supporting petitioner's automatic-reversal position, *Wood* v. *Georgia* undermines it. Furthermore, as we have explained, there was no likelihood of an actual conflict of interest apparent in this case that would have im-

posed on the court the duty of inquiry recognized in *Wood* v. *Georgia*.

Finally, petitioner notes that several courts of appeals have held that the government bears the burden of showing the absence of prejudice when the trial court has failed to conduct an inquiry into joint representation. Pet. 11 (citing *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976), and *United States* v. *Foster*, 469 F.2d 1 (1st Cir. 1972)).[5] Those decisions, however, predated both *Cuyler* v. *Sullivan* and the adoption of Rule 44(c), and the courts there imposed the burden-shifting principle under their supervisory powers, not under the Sixth Amendment or Rule 44(c). Interpreting the Sixth Amendment, *Cuyler* v. *Sullivan* plainly requires a defendant who has raised no objection at trial to demonstrate an actual conflict of interest. By contrast, shifting the burden to the government "would result in a presumption of conflict clearly at odds with the holding and reasoning of *Cuyler* [v. *Sullivan*] and the decisions interpreting [Rule] 44(c)," and "allowing a defendant to benefit by remaining silent at trial would undercut the policy of early conflict determination which underlies Rule 44(c)." *United States* v. *Burney*, 756 F.2d at 792 n.5.

Although the First and Second Circuits have recited the burden-shifting formulation in subsequent cases,[6]

---

[5] Petitioner also cites (Pet. 11) *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203 (3d Cir. 1973), for this proposition, but that decision did not announce such a rule.

[6] See *United States* v. *Mazzaferro*, 865 F.2d 450, 454 (1st Cir. 1989); *United States* v. *Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987), cert. denied, 486 U.S. 1034 (1988); *United States* v. *Edwardo-Franco*, 885 F.2d 1002, 1007 (2d Cir. 1989).

the decision by those two courts to carry forward that feature of their prior supervisory-power rule after the decision in *Cuyler* v. *Sullivan* and the adoption of Rule 44(c) more than ten years ago does not warrant review. There is no indication that this narrow issue is of substantial importance, since district courts are now sufficiently familiar with Rule 44(c) that failures to follow it are rare, and even where a failure occurs, there is no reason to believe that the allocation of the burden of proof has a decisive effect in very many cases.

Moreover, in the court of appeals, petitioner proposed a burden-shifting approach only in passing, and it was narrower than the one she now apparently proposes. In the court of appeals, petitioner conceded (C.A. Br. 13-14) that she should be required to show that her counsel had an actual conflict of interest, and that only then would there be a presumption of prejudice. As we have explained above, petitioner has not carried her threshold burden under the very approach she proposed below, because she has not established the existence of an actual conflict of interest, much less one that adversely affected counsel's performance on her behalf at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

SEPTEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20126